BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MANUEL MAGALLANEZ Claimant VS. **IBP, INC.** Respondent Self-Insured	)	Docket No. 160,145

ORDER

The claimant requests review of Administrative Law Judge Floyd V. Palmer's Award entered in this proceeding on July 29, 1994. Appeals Board Member Gary M. Korte recused himself from this proceeding and Jeff K. Cooper was appointed Appeals Board Member Pro Tem.

APPEARANCES

Claimant appeared in person and by his attorney, David O. Alegria, of Topeka, Kansas. The respondent and insurance carrier appeared by their attorney, Pamela L. Falk, of Emporia, Kansas. There were no other appearances.

RECORD & STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are listed in the Award.

ISSUES

Nature and extent of disability for an occupational disease.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant was first employed by IBP, Inc., on June 16, 1986. In June 1991, claimant was working for IBP, Inc., on a job known as "blowing hocks" on the slaughter side of respondent's plant. This job required claimant to use a high pressure air hose to blow dirt and contamination from the hocks of the carcasses. The contamination included hair, blood, bone chips, dirt, fecal material and sometimes pus. Before May 25, 1991, the only protection provided to claimant was safety glasses. Before that time claimant's whole face

would be covered with the contamination from the hocks at the end of the shift. Claimant requested protective equipment several times before May 25, 1991, but it was not provided. Claimant was required to change his glasses at least twice during each shift due to the dirt and contamination which accumulated on the glasses. The compressed air used by the claimant to blow hocks was between seventy-five and one hundred twenty-five (75-125) pounds per square inch. Although the job was designed to blow contamination away from the worker performing the job, there was occasional splatter. According to the respondent, face masks were available and would be furnished upon request of the worker; however, claimant testified that he asked for one several times before he was finally furnished a face mask approximately one (1) week before acute onset of symptoms. Further complicating the hock blowing job, were the hot temperatures and high humidity on the kill floor. Up to three thousand eight hundred fourteen (3,814) hocks would be cleaned by the blowing process per shift.

Mr. Richard L. Kuhlmann, general supervisor on the slaughter side, testified regarding the "hock blowing" job. Mr. Kuhlmann described the job as blowing dust, contamination and hair away from the person doing the job, with the employee's body being sixteen to eighteen (16-18) inches away from the carcass. Mr. Kuhlmann testified that the employee would get an occasional splatter when they were blowing away, but would not be covered with it. Mr. Kuhlmann admitted that he had never seen the claimant perform this job, and further testified that he had only performed the job for a short period of time. Mr. Kuhlmann testified that the job required blowing dirt, hair and contaminants, which can include dried fecal material, from the carcass. He also acknowledged that the employee would be breathing contaminated air because of the contaminants that are being blown into the air.

On June 3, 1991, claimant began experiencing pain in his chest and was sweating, and he believed he was having a heart attack. Claimant was admitted to the hospital and examined by Dr. Edward Campbell, and later by Dr. Chester Stone. Tests established that claimant suffered from an abscess in his liver, which was determined by Dr. Stone to be caused by the bacteria, clostridium perfringens. Dr. Stone testified that the bacteria is common in the environment and is present in the soil; however, it is particularly common in the fecal material and intestines of mammals. Claimant testified that he did not play or work with dirt outside his employment with IBP, Inc., and had not come into contact with any feces anywhere other than IBP, Inc. Claimant is not aware of anywhere else he may have come into contact with the bacteria outside of respondent's plant.

Claimant was treated with antibiotics and was hospitalized from June 3, 1991, through June 13, 1991. Claimant was further treated on an outpatient basis for eight (8) days following discharge with intravenous antibiotics and was followed by Dr. Stone in follow-up care. Claimant continued to have localized pain in the right upper quadrant and was treated with oral antibiotics and was given Darvocet N 100 as pain medicine. On March 6, 1992, test results indicated that the abnormal liver abscess had completely disappeared, and the exam was considered within normal limits. Dr. Stone continued to see claimant periodically for complaints of pain in the right upper quadrant of the abdomen and prescribed Darvocet for his continued complaints of pain. Dr. Stone last saw the claimant on April 5, 1993, and repeat tests were negative. Dr. Stone testified that when he provided treatment claimant had an abscess which was a collection of necrotic tissue in the liver. Dr. Stone indicated that necrotic or dead cells and tissues would not come back to life. He testified that based on claimant's testimony working in his job as a "hock blower" for a period of several months without any protective equipment, in his opinion, more probably than not, would expose claimant to the bacteria. On cross-examination Dr. Stone indicated that claimant was at risk for the type of bacteria contracted even if he had protective equipment. Also, he indicated that claimant would be at an increased risk to contract the bacteria as a result of his regular work activities as compared to the general public. Dr. Stone restricted claimant from working for eight to ten (8-

10) weeks following the liver abscess. Dr. Stone returned claimant to work as tolerated following the course of treatment. Dr. Stone felt the claimant's liver had returned to normal and did not assign any functional impairment rating to claimant.

Regarding causation of the liver abscess, the treating physician, Dr. Stone, gave different versions to the parties, depending on the facts presented. On August 6, 1991 in response to a letter from the claimant's attorney, Dr. Stone wrote that it was more probably true than not that claimant's liver abscess was caused by his exposure in the work place. On October 7, 1991, after meeting with three (3) representatives of the respondent who explained claimant's work activities and showed photographs of the work station and protective equipment purportedly used by the claimant, Dr. Stone changed his opinion and stated that it was very unlikely that claimant's medical problems were work related. However, on cross-examination Dr. Stone testified that it was more probably true than not that claimant was exposed to this life-threatening bacteria at work if he indeed did work the job in question for a period of several months without protective equipment.

The claimant was examined at his attorney's request on September 21, 1992 by Dr. Daniel D. Zimmerman of Kansas City, Missouri. Laboratory tests were also performed at that time. These tests were more specific than tests run by Dr. Stone. Dr. Zimmerman testified that the test results continued to show liver abnormalities, and based upon the abnormalities as well as the claimant's complaints of pain and discomfort, as well as weakness, Dr. Zimmerman found that the claimant suffered permanent partial impairment as a result of the liver abscess. Dr. Zimmerman also testified that it is more probably true than not, the workplace exposure was the cause of the liver disease and abscess of the liver. Dr. Zimmerman felt that the claimant had ongoing liver problems at a cellular level based on test results, ongoing weakness and right upper quadrant pain. Based upon the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Zimmerman assessed permanent partial impairment at twenty percent (20%) to the body as a whole.

The Administrative Law Judge found that the disease process caused by the bacteria clostridium perfringens arose out of and in the course of claimant's employment, and this issue was not appealed by the claimant or the respondent. The record sets forth substantial evidence to support the decision of the Administrative Law Judge that the disease and resulting injury arose out of and in the course of his employment with the respondent. Both Dr. Stone and Dr. Zimmerman testified that the employment more probably true than not caused claimant to be exposed to an added risk or hazard. In Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979), the Court held that the pivotal question to be answered was whether the employment caused the employee to be exposed to an added risk or greater hazard. The Appeals Board finds the liver disease arose out of and in the course of claimant's employment.

As the trier of fact, the Appeals Board has the right and obligation to weigh the evidence to determine the credibility of the witnesses, including the physicians who testified, in making its decision on the disability of the claimant. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 784-785, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

Considering the opinions of Dr. Stone, Dr. Zimmerman, testimony of both the claimant and Mr. Kuhlmann, as well as the rest of the record when taken as a whole, the Appeals Board finds that the liver abscess more probably than not developed as a result of exposure to the bacteria in the workplace.

The Appeals Board further finds that the claimant has a twenty percent (20%) permanent partial impairment to the liver attributable to this occupational disease.

The record indicates claimant apparently returned to work for the employer at his former wage doing painting. There is no evidence in the record of the amount of wages claimant received following his occupational disease and, therefore, the claimant has failed to show any evidence of wage loss.

Under the occupational disease statutes, K.S.A 44-5a01(a) provides that occupational disease shall be treated as the happening of an injury by accident, and the employee shall be entitled to compensation for such disablement in accordance with the provisions of the Workers Compensation Act, as in the cases of injuries by accident. The clear statutory intent is that an occupational disease should be treated in the same manner as an injury by accident in terms of compensation for disablement. The occupational disease section of the Act provides no instruction on computing benefits available to a worker for an occupational disease. Slack v. Thies Development Corp, 11 Kan. App. 2d 204, 718 P.2d 310 (1986). The only provision under the occupational disease statutes dealing in any manner with determining amounts of compensation is found at K.S.A. 44-5a04 which provides as follows:

> "(b) The administrative law judge may cancel the award and end the compensation if the administrative law judge finds that the employee: (1) Has returned to work for the same employer in whose employ the employee was disabled or for another employer and is capable of earning the same or higher wages than the employee did at the time of the disablement, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of disablement; (2) is absent and continues to be absent so that a reasonable examination cannot be made of the employee by a health care provider selected by the employer; or (3) has departed beyond the boundaries of the United States."

The provisions of K.S.A. 44-5a04 have been construed by the Kansas Supreme Court in terms of whether the statute is discretionary on the part of the Director. The Court held K.S.A. 44-5a04 does not require cancellation or end of the award, but is simply discretionary. See Ross v. Beech Aircraft Corporation, 214 Kan. 888, 522 P.2d 369 (1974). Hill v. General Motors Corporation, 214 Kan. 279, 519 P. 2d 608 (1974). It should further be noted that in Hill the Court dealt with the issue of functional impairment from synovitis that resulted from an occupational disease, and allowed the claimant to retain the seven and one-half percent (7½%) functional impairment award granted under the occupational disease claim. The Court refused to overturn the Director's ruling that the claimant was entitled to the functional impairment award even though there was no wage loss.

There does not appear to be any reported cases on occupational disease subsequent to 1987. In 1987, the Legislature amended K.S.A. 44-510e, and expressly stated that permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment was further defined as meaning the extent, expressed as a percentage, of the loss of the total physiological capabilities of the human body as established by competent medical evidence. The occupational disease statute contains no mechanism for computation of benefits under the Workers Compensation Act; however, it does refer back to the provisions dealing with accidental injury for purposes of computation for a permanent partial general disability. It is, therefore, the opinion of the Appeals Board that K.S.A. 44-510e is equally applicable to both personal injury claims as well as occupational disease claims where functional impairment exists.

The Legislature intended to provide benefits for injury resulting from occupational diseases and, therefore, broaden the scope of employees entitled to benefits under the Workers Compensation Act. Bayless v. List & Clark Construction Co., 201 Kan. 572, 441

P. 2d 841 (1968). Clearly, the Court in Schubert v. Peerless Products, Inc., 223 Kan. 288, 573 P.2d 1009 (1978), held that the occupational disease provisions of the Kansas Workers Compensation Act contemplates the recovery for an occupational disease where no "functional disability" exists. The Court allowed compensation for this occupational disease case where there was no functional impairment rating, indicating claimant could be compensated based upon a diminution of earning capacity. There appears to be no rationale to deny compensation when an individual has a permanent impairment of function as the result of an occupational disease. Considering the provisions of the occupational disease statutes that indicate occupational disease shall be treated as an injury, the Appeals Board finds claimant is entitled to permanent partial disability benefits based upon his functional impairment rating. Denying compensation for an occupational disease where there is permanent functional impairment does not comport with the intent of the Legislature to broaden the scope of coverage of the Workers Compensation Act to include injuries caused by occupational diseases.

For purposes of the decision in this case, the Appeals Board is unable to distinguish the right to permanent partial disability benefits based upon the functional impairment rating as the minimum percentage of disability for injury caused by an occupational disease from the right to benefits for injury caused by an accident. The record supports the conclusion that claimant has sustained a twenty percent (20%) permanent partial impairment to the body as a whole, and pursuant to K.S.A. 44-510e, the claimant is entitled to compensation based on his permanent functional impairment.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Floyd V. Palmer on July 29, 1994, should be, and hereby is, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN FAVOR OF the claimant, Manuel Magallanez, and against respondent, IBP, Inc., self-insured, based on an average weekly wage of $358.34 for an occupational disease occurring on June 4, 1991, for 8.29 weeks of temporary total disability compensation at the rate of $238.91 per week in the sum of $1,980.56, and 406.71 weeks of compensation at the rate of $47.78 per week for a 20% permanent partial general disability in the sum of $19,432.60, for a total award of $21,413.16. As of December 10, 1995, there is due and owing to the claimant 8.29 weeks of temporary total compensation at $238.91 per week in the sum of $1,980.56, and 227.42 weeks of permanent partial compensation at the rate of $47.78 per week in the sum of $10,866.13 making a total due and owing of $12,846.69, which is ordered paid in one lump sum, less compensation previously paid. The remaining balance of $8,566.47 is to be paid for 179.29 weeks at the rate of $47.78 per week until fully paid or further order of the Director.

Claimant is awarded all past medical. Also future medical treatment may be awarded upon proper application to the Director.

Costs are hereby assessed against the respondent.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid directly as follows:

Appino & Biggs Reporting Service $481.95
Transcript of Regular Hearing (4/23/93)
Deposition of Richard L. Kuhlmann (8/19/93)

Deposition of Lola J. Collinge (8/19/93)
Deposition of Chester W. Stone, M.D. (6/17/93)

Nora Lyon & Assoc. (Correll Reporting Service) $204.10
Transcript of Preliminary Hearing (2/14/92)

Gene Dolginoff Associates, Ltd. $332.75
Deposition of Daniel D. Zimmerman, M.D.(11/3/92)

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER PRO TEM

BOARD MEMBER

BOARD MEMBER

c: David O. Alegria, Topeka, Kansas
IBP Legal Dept, P.O. Box 2204, Emporia, Kansas
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director